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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-547

MYRON LESKIW, SIDNEY LURINSKY, DONALD WASHINGTON, FRANK OPALOCK, JOHN QUINN and ROBERT KOWTOZEWSKI,

Petitioners,

v.

LOCAL 1470, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC, ANTHONY MAKRIS, as President of Said Local 1470 and WESTERN ELECTRIC COMPANY, INC., (KEARNY WORKS),

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT WESTERN ELECTRIC COMPANY, INC. IN OPPOSITION

Questions Presented

1. Does the complaint state a claim cognizable under Section 301 of the Labor Management Relations Act

where there is no allegation of violation of a collective bargaining agreement.

2. Does the assertion (raised for the first time in petitioners' brief before the Court of Appeals) that the Union breached a recognition agreement by breaching its duty of fair representation form the basis for Section 301 jurisdiction where such jurisdiction does not otherwise exist.

3. Assuming Section 301 jurisdiction exists, does the complaint, which predicates conclusionary allegations of hostile, invidious discrimination solely upon the existence of differences in employees' wages under a collective bargaining agreement, state a claim upon which relief can be granted.

Statute Involved

Section 301(a) of the Labor Management Relations Act of 1947, as amended, 61 Stat. 156, 29 U.S.C. §185(a)

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Statement of the Case

The petition to this Court for a writ of certiorari to the Court of Appeals for the Third Circuit pursuant to 62 Stat. 928, 28 U.S.C. §1254(1), is predicated upon the contention that petitioners' complaint states a claim for relief and that such claim is cognizable under Section 301 of the

Labor Management Relations Act of 1947, as amended, 61 Stat. 156, 29 U.S.C. §185.

Petitioners commenced this action in the United States District Court for the District of New Jersey against (1) Western Electric Company, Incorporated (hereinafter "Western") and (2) Local 1470, I.B.E.W., AFL-CIO-CLC (hereinafter the "Union") and Anthony Makris, President of the Union.

Petitioners are six members of the Union and are employees of Western. They and other employees are in a collective bargaining unit for which the National Labor Relations Board has certified the Union as collective bargaining representative.

Western argued in the District Court and Third Circuit that jurisdiction over the subject matter of the complaint did not exist under Section 301 and that the complaint failed to state a claim upon which relief could be granted. Western's motion to dismiss the complaint in the District Court, and the motion of the other respondents, were granted on the ground that jurisdiction was lacking under Section 301. The District Court found it unnecessary to rule with respect to Western's alternative ground for dismissal of the complaint. (Petition, p. 11a). On appeal, the Third Circuit affirmed the decision of the District Court.

In the complaint petitioners purport to represent a class of employees which includes all Testers-Inspectors, although the complaint asserts that some Testers-Inspectors were "underpaid" as compared with what other Testers-Inspectors were paid. The charge is that through the process of collective bargaining Western and the Union agreed to contract provisions under which some employees were paid on a different basis than other employees, resulting in differences in wages accorded em-

ployees under the collective bargaining agreement. It is claimed that this result is the effect of the establishment in December, 1964, of two groups of Testers-Inspectors:

1. "Day workers, i.e., those working on non-productive work and without incentive", and

2. "Supplementary or meantime workers to whom a supplement of 50¢ is also paid." (Paragraph 18 of the complaint; Petition, p. 4a).

The complaint, filed in May, 1970, notes that the same grouping of Testers-Inspectors was included in four successive collective bargaining agreements between Western and the Union, namely those of 1964, 1966, 1968 and 1969.

Based on the establishment of groups paid on a different basis, petitioners allege that they have been subjected to hostile and arbitrary discrimination and treated in an invidous, irrelevant manner. These charges of discrimination apparently rest on the alleged fact that some, but not all, Testers-Inspectors are paid on an incentive basis. No facts are pleaded which support these conclusionary allegations of discrimination.

It is not alleged in the complaint that Western violated any provision of a collective bargaining agreement. Petitioners contend that their action is maintainable under Section 301 because there has been a breach of a "recognition agreement" necessarily resulting from a breach of duty of fair representation. (Petition, p. 9). The complaint asserts no such claim. Petitioners never advanced this claim before the District Court, but raised it for the first time in their brief on appeal to the Third Circuit.

The relief requested in the complaint is: damages for loss of wages, an order requiring the respondents to negotiate wage increases, and an order enjoining respondents from further alleged discrimination in the negotiation and application of labor agreements.

ARGUMENT

I.

The Decision of the Third Circuit is correct and is consistent with the Decisions of this Court and the Courts of Appeals.

The Courts of Appeals for the Third and Eighth Circuits have ruled that an action may not be maintained under Section 301 where there is no allegation of violation of a collective bargaining agreement.

In *Adams* v. *Budd*, 349 F. 2d 368 (3rd Cir. 1965), plaintiff employees, in their action against their employer and union, alleged that they had been deprived of certain seniority rights by reason of the provisions of a subsequently negotiated collective bargaining agreement. The complaint contained conclusionary allegations of conspiracy, arbitrary, capricious and malicious acts and breach of a duty of fair representation. The complaint in the instant case similarly sets out allegations of discrimination, arbitrariness, hostility, neglect, etc. and appears to predicate a claim upon the fact that the collective bargaining agreements negotiated between Western and the Union failed to give plaintiffs certain benefits which it claimed other employees enjoyed. Neither the complaint in this case nor the complaint in *Adams* alleged violation of a collective bargaining agreement. The Court of Appeals in *Adams* held that the District Court did not have jurisdiction under Section 301, stating:

> "Here the plaintiffs do not seek redress for violation *of* a collective bargaining agreement; what they seek is redress for an alleged violation *by* a la-

> bor contract of rights which they assert were independently, and pre-agreement, vested in them by their 'contract of hire'." 349 F. 2d at 370.

In *Woody* v. *Sterling Aluminum Products, Inc.*, 365 F. 2d 448 (8th Cir. 1966), *cert. denied*, 386 U. S. 957 (1967), *rehearing denied*, 386 U. S. 1027 (1967), a group of 193 employees sued Sterling (their former employer) and their union. Sterling and the union had negotiated a collective bargaining agreement which permitted Sterling to close its plant. Sterling's subsequent closing of its plant and release of its employees, including plaintiffs, gave rise to the suit. The Court of Appeals affirmed the District Court's dismissal of the complaint.

In one count of the complaint in *Woody*, the plaintiffs charged the union with "conspiring and colluding with Sterling, bargaining in bad faith to plaintiffs' detriment, and failing to represent plaintiffs fairly and honestly." 365 F. 2d at 456. In affirming the District Court's dismissal of this count of the complaint, the Court of Appeals summarized the lower court's holding

> "that the plaintiffs' charges of the Union's bad faith in negotiating the collective bargaining agreement were not predicated upon the collective bargaining agreement so as to give the court jurisdiction under §301, but rather looked beyond the agreement to the exclusive bargaining representatives' obligation of fair representation and was within the exclusive jurisdiction of the National Labor Relations Board." 365 F. 2d at 456.

The Third Circuit's holding in this case and the holdings in *Adams* v. *Budd*, 349 F. 2d 368 (3rd Cir. 1965) and *Woody* v. *Sterling Aluminum Products, Inc.*, 365 F. 2d

448 (8th Cir. 1966), *cert. denied*, 386 U. S. 957 (1967), *rehearing denied*, 386 U. S. 1027 (1967), are consistent with *Vaca* v. *Sipes*, 386 U. S. 171 (1967). The plaintiff in *Vaca* had been discharged by his employer upon his return from sick leave. Plaintiff there alleged that his discharge had been in violation of the collective bargaining agreement between his employer and union.

On appeal before the Third Circuit and in their petition filed herein petitioners have attempted to bring themselves within the ambit of *Vaca* v. *Sipes*, 386 U. S. 171 (1967), by asserting that this is a Section 301 suit "because there was a breach of the preliminary recognition agreement and because the Employer collaborated with the Union's unfair representation." (Petition, p. 9).

The Union was certified as the collective bargaining representative of a unit of Western's employees, including petitioners, by the National Labor Relations Board. The recognition clause of the collective bargaining agreement between Western and the Union does nothing more than recite the bargaining obligation imposed by law pursuant to the Board's certification.[1] Recognition is not an agreement or contract at all, but rather is the expression of an obligation to bargain imposed by law. Even if a contractual obligation could possibly be viewed as arising from

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[1] "Article 1—Recognition

The Company hereby recognizes the Union as the exclusive representative of the employees in the bargaining unit set forth in Paragraph 12 and the footnotes applicable thereto, of the Agreement for Consent Election executed by the Company and the Union on January 21, 1952.

The recognition is in compliance with the certification of the National Labor Relations Board dated June 25, 1952, in Case No. 2-RC-4359."

recognition in the context of the duty of fair representation, it must be an obligation which runs from a union to the employees which it represents, an obligation which is implied in law. This Court has recently decided that a suit predicated on "union-employee contracts that are said to be implied in law" are not cognizable under Section 301. *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 300 (1971).

II.

The complaint fails to state a substantial federal claim warranting the Court's consideration.

The complaint alleges that all Testers-Inspectors perform "similar and allied" work (paragraph 17; Petition, p. 4a) and "identical or practically identical" work (paragraph 20; Petition, p. 4a) which consists of inspecting and testing apparatus, devices, and modules; Testers-Inspectors were divided into two groups, day workers and incentive workers; some Testers-Inspectors were "underpaid." After asserting these differences between Testers-Inspectors, the complaint jumps to the legal conclusion, unsupported by any additional pleadings of fact, that respondents disregarded the interests of some Testers-Inspectors, discriminating against them, and denying them wage increases by means of hostile, arbitrary, invidious and irrelevant discrimination.

Apparently drawing upon the language of such cases as *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192, 203 (1944), the complaint in this case does charge the Union with "hostility and arbitrary discrimination" (paragraph 27; Petition, p. 6a), and with treating petitioners in "an arbitrary, unfair, invidious and irrelevant man-

ner." (paragraph 28; Petition, p. 6a). These conclusionary allegations, however, are predicated solely on the allegations that two groups of Testers-Inspectors were established, day workers and incentive workers, and the further conclusionary allegation that one group is "underpaid." (paragraph 20 of the complaint; Petition, p. 4a). The fact that one group of employees might earn more money than another group which performs "similar and allied" work or even "identical or practically identical" work (see paragraphs 17 and 20 of the complaint; Petition, p. 4a) does not support an inference of arbitrary, hostile, invidious, irrelevant discrimination.

There are numerous situations, justifiable in an industrial context, in which workers performing the same or similar functions earn different amounts of pay or are paid on different bases. The most obvious of these include the payment of "shift differentials" and the differing earnings of incentive workers. By definition, an incentive worker's pay must in some way be controlled by the quantity and/or quality of his work, and therefore, may fluctuate from one pay period to the next. Obviously then, all incentive workers will not earn pay equal to that of a "day worker" (alleged to be working "without incentive") whose pay rate is fixed and does not fluctuate. Furthermore, the earnings of an employee working on a group incentive basis, for example, will be based not only on his own efforts but on those of the other members of the group. Such an employee might earn more or less than other employees who perform similar or identical work but are in a different group or are not in any group or are not on incentive.

The complaint in this case seeks access to the federal courts upon the mere showing of differences in conditions of employment between employees in a collective bar-

gaining unit. Under petitioners' theory any disgruntled employee could easily use the federal courts as a forum to demand that his employer justify the basis on which he pays thousands of employees and that his union justify the grounds for any and all differences between employees under a collective bargaining agreement; all the employee need do is allege differences between employees and conclude in his pleadings that such differences result from hostile, invidious, irrelevant discrimination. Since nearly all collective bargaining agreements contain such differences, employers and unions may often be called upon in federal court to demonstrate in each particular case the justification for such things as the payment of shift differentials, differences in wage rates for different job classifications, or the establishment of incentive wage systems.

The impact of permitting such suits to be maintained was discussed by District Judge Coolahan in his decision below:

> ". . . one must inquire as to the potential consequences should suits like this be allowed to be maintained. Surely the salutary objective of §301 would not be fostered. Every dissident faction of union members would be able to bring suit in district court by simply alleging unfair representation should they find themselves dissatisfied with the bargain struck by their lawfully elected representatives." Petition, p. 15a.

Judge Coolahan's reasoning is amply supported. In affirming the dismissal of a suit predicated on breach of the duty of fair representation rather than on breach of a collective bargaining agreement, the Court of Appeals for the Eighth Circuit, in *Woody* v. *Sterling Aluminum Prod-*

acts, 365 F. 2d 448, *cert. denied*, 386 U. S. 957 (1967), *rehearing denied*, 386 U. S. 1027 (1967), stated:

> "No precedent has been called to our attention and our research has revealed none that would vest the federal courts with jurisdiction under such circumstances as exist here. *Indeed, to rule jurisdiction might well jeopardize the whole concept of collective bargaining as we know it. We are not prepared to pioneer the allowance of so drastic a step . . .*" 365 F. 2d at 457 (Emphasis added).

The Court's reluctance in *Woody* to unnecessarily tamper with the collective bargaining process was foreseen by Professor Clyde W. Summers:

> "Bargaining is a process of exchange, compromise and surrender of a multitude of claims, and the parties are concerned with finding a formula for settlement. For the courts to weigh too closely the allocation of the benefits among the employees would plunge the courts into a task far beyond their competence and seriously hinder the parties in reaching an agreement." Summers, *Collective Power and Individual Rights in The Collective Agreement—A Comparison of Swedish and American Law*, 72 Yale L. R. 421, 434 (1963).

Most importantly, this Court has also recognized that all those covered by a collective bargaining agreement need not be accorded the same benefits by that agreement.

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. *The mere existence of such differences does not make them invalid. The complete satis-*

> *faction of all who are represented is hardly to be expected." Ford Motor Co.* v. *Huffman,* 345 U. S. 330, 338 (1953) (Emphasis added).

Petitioners have failed to state any fact which would reasonably lead the Court to infer any lack of justification for the establishment of two groups of employees, paid on two different bases. The complaint is utterly devoid of any pleadings of fact which would support petitioners' conclusionary allegations of hostile, invidious discrimination; rather, petitioners seek the right to maintain this action in the federal courts predicating these conclusionary allegations on the "mere existence of . . . differences" among employees.

The impact of such suits on the federal courts will be substantial not only because of the number of suits which will be generated but also because they will require the courts to evaluate the allocation of benefits under an agreement, thus second-guessing the negotiators and hindering unions and employers in negotiating agreements. Such suits would present a threat to the collective bargaining process itself.

The complaint in this case fails to state a claim upon which relief can be granted and fails to present this Court with a federal question worthy of its consideration.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit should be denied.

Dated: November 3, 1972

Respectfully submitted,

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